IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 6TH FEBRUARY 2007 / 17TH MAGHA 1928

WA.No. 1787 of 2006()

{IN W.P.(C)NO.18412/2005 OF THIS COURT}
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APPELLANT/RESPONDENT NO.3 :

SHRI.ABDUL LATHEEF,
PRINCIPAL, W.M.O.ARTS & SCIENCE COLLEGE,
MUTTIL, WAYANAD.

BY ADV. SRI.KRB.KAIMAL

RESPONDENTS/PETITIONER & RESPS.1,2 & 4 :
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1. DR.SABU.P.SAMUEL,
PUNNAPUZHA HOUSE, MANIKULATHUPARAMBA,
THENHIPALAM.P.O., CALICUT UNIVERSITY WEST,
PRESENTLY HEAD OF THE
DEPT.OF PHYSICAL EDUCATION,
DEPT.OF PHYSICAL EDUCATION,
MEDICAL COLLEGE,
KOZHIKODE.

2. UNIVERSITY OF CALICUT,
REP.BY ITS REGISTRAR,
UNIVERSITY ADMINISTRATIVE OFFICE,
CALICUT UNIVERSITY.P.O., PIN.673635.

3. THE VICE CHANCELLOR,
UNIVERSITY OF CALICUT,
UNIVERSITY ADMINISTRATIVE OFFICE,
CALICUTUNIVERSITY.P.O., PIN.673635.

4. SHRI.MOHAMMED ASHARF.M.,
COACH IN ATHLETICS, UNIVERSITY OF CALICUT,
CALICUT UNIVERSITY.P.O., PIN.673635.

BY ADV. SRI.E.S.ASHRAF, SC, CALICUT UNIVERSITY
R1 BY ADV.SRI.ALEXANDER THOMAS
SRI.P.C.SASIDHARAN, SC, CALICUT UTY.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ALONG WITH WA NO.2053 OF 2006 ON 06/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.A.ABDUL GAFOOR &
K.R.UDAYABHANU, JJ.

W.A.No.1787 & 2053 of 2006

Dated this the 6th day of February, 2007.

JUDGMENT

Abdul Gafoor, J.

W.A.No.1787/06:

The University of Calicut issued a notification Ext.P1 in W.P.(C)No.18412/05 inviting application to the post of Director of Physical Education. The notification also stipulated the required qualifications. But, it did not contain any specification regarding the upper age limit. The appellant and 1st respondent and other candidates submitted their applications. A select list was drawn up by the University in which the appellant figured as No.1 in rank and the writ petitioner/1st respondent figured as rank No.III. The appellant was offered appointment. This appointment was challenged by the writ petitioner on the ground that the appellant was over aged even at the time

of Ext.P1 notification. According to him, a candidate responding to Ext.P1 notification ought not to have completed the age of 45 years going by the entries in the schedule to the Calicut University First Ordinance, 1978 {hereinafter referred to as '**the Ordinance**'}.

W.A.No.2053/06:

2. The appellant in this case filed W.P.(C) No.37009/04 impugning the said notification on the ground that it ought not to have been issued without specifying an upper age limit. It was with a mala fide intention to prefer some candidates in the choice of someone in the higher ups of the University. Therefore, Ext.P1 notification ought to have been quashed.

3. The learned single Judge considered both the writ petitions together and dismissed the latter one

and allowed the former one holding that the selected candidates viz., the appellant - rank No.1 and another rank No.II, had already crossed the age of 45 years, which was fixed as per the Ordinance for such appointment to the post and the writ petitioner/1st respondent in W.A.No.1787/06 holding rank No.3, being the candidate within the age, was directed to be appointed. According to the learned single Judge, the notification is always subject to statutory Ordinance prescribing the qualifications, age and method of appointment. Therefore, irrespective of absence of any specification regarding the age in Ext.P1 notification, the University was bound to follow the Ordinance and the age prescribed therein for recruitment to the post in question and therefore ought to have appointed the

persons who come within such upper age limit. Accordingly, as the candidates holding rank Nos.1 and II were found to be over aged and rank No.3, the writ petitioner in W.P.(C)No.18412/05 was directed to be appointed. It is in the above circumstances, the appellant in W.A.No.1787/06 - who holds rank No.1, has come up with the appeal as his appointment is at stake and the writ petitioner in W.P.(C)No.37009/04 has come up with the other writ appeal, insofar as his challenge against Ext.P1 was not accepted. There is no appeal against the judgment in W.P.(C)No.14446/05, which was also disposed of by the impugned common judgment.

4. The contention of the appellant in W.A.No.1787/06 is that the post of Director of Physical

Education is a teaching post, for which, the University Grants Commission has prescribed the qualifications. It is those qualifications, which have been specified in Ext.P1. There is no age limit prescribed by University Grants Commission for teaching posts. In such circumstances, the University was right in not specifying any age limit in Ext.P1 notification and in drawing up a select list including him, who had crossed the age of 45 years. It is further submitted that upper age limit of 45 years was fixed for the post in question as per the Schedule to the Ordinance before its substitution, when the post was a non-teaching post. The present schedule introduced in 2004 by way of amendment did not contain this post. Going by Clause (3) in Chapter XV of the Ordinance, the schedule is applicable only to

non-teaching posts. That the Director of Physical Education does not find a place in the schedule is indicative that it is not a non-teaching post now. Further, it is submitted that based on the University Grants Commission Revised Scheme 1978, as embodied in G.O.(P)No.171/99/H.Edn dated 21.12.1999 and entries in Appendix D thereto, the post in question is a teaching post in any University. There is no stipulation anywhere in the Regulations of the University Grants Commission or that of the University prescribing upper age limit for appointment to teaching posts. It is further submitted that even if the post in question is a non-teaching post, Annexure A further amendment to the schedule to the Ordinance, reveals that there was no age limit for recruitment. Therefore,

his selection ought not to have been interfered with by the learned single Judge.

5. It is contended by the appellant in W.A.No.2053/06 that for direct recruitment, the upper age limit is an essential factor, going by Clause (3) in Chapter XV of the Ordinance. It reads as follows:

> ***"3.(1) The scales of pay, minimum qualifications, age limit the appointing authority and method of recruitment to the posts specified in Column (1) of the schedule given hereunder shall be as prescribed in the corresponding entries in columns 3,4,5,6 and 7 respectively thereof."***

Therefore, non-specification of upper age limit in Ext.P1 is a device adopted by the persons in the higher ups in the University to chose certain persons of their choice and select him. That cannot be an attitude to be followed by a statutory authority like the University.

The stipulations and specifications regarding the norms for selection shall always be definite so as to avoid arbitrariness in selection applying the sweet will of the selecting authority. Ext.P1 did not admittedly contain any age limit. Necessarily, as it was likely to result in arbitrariness in choosing the persons of likeness by those engaged in the selection process, necessarily, the learned single Judge ought to have interfered with Ext.P1 and quashed it.

7. It is contended by the writ petitioner in W.P.(C)No.18412/05, who has been directed to be appointed by the learned single Judge that, the amendment effected to the schedule to the Ordinance in the year 2004 was only in respect of the items mentioned in the amended schedule. As regards the

post which does not find a place in the amended schedule, the stipulations in the original schedule will subsist. It includes the post in question with an upper age limit of 45 years. That upper age limit shall have to be taken as on First January of the year in which the notification was issued as was the norm followed by the University and by Government. If that pattern is followed, necessarily, the appellant in W.A.No.1787/06 and rank holder No.2, were beyond that upper age limit and could not have been included in the select list. It is further submitted that even if the amendment to the Ordinance as contained in Annexure A filed along with W.A.No.1787/06 is taken note of, it will be an amendment to the qualification alone, and the age limit in the original schedule still survives. Therefore, there

is no reason to interfere with the impugned judgment in W.A.No.1787/06, it is contended.

8. When the age limit mentioned in the original schedule thus survives, there is nothing illegal to set aside Ext.P1 notification accepting the contention regarding the absence of age limit urged by the appellant in W.A.No.2053/06; he further contends.

9. Amendment of the Schedule to the Ordinance is the relevant aspect in this case, going by the submissions from either side. In the wake of that, we have to find out what was the effect of amendment effected to the schedule, in the year 2004. For that purpose, we directed the standing counsel of the University to produce before us the minutes of the Senate which made that amendment and the assent

given thereto by the Chancellor in terms of Section 37 (3). Both the documents have been produced before us. The latter does not throw any light with regard to the intention and purpose of amendment as it contains only the assent given by the Chancellor.

10. We perused the minutes regarding the item "Draft Amendment to Ordinance 2(3) of Chapter XV of CUFO 1978". The decision is as under:

> "The existing schedule of ordinance 2(3) as amended is appended".

11. Really, the amendment is to Clause (3) in Chapter XV of the Ordinance 1978. The amendment appended thus is in place of the existing schedule. Necessarily, whatever there had been earlier were replaced by the schedule 'appended' to the decision.

12. In the then existing schedule, there was a post of Director of Physical Education with certain qualifications with upper age limit specification as 45 years. But, in the schedule appended, based on the said amendment effected by the Syndicate in its meeting held on 30.3.2001 and 31.3.2001, there is no post with the nomenclature of Director of Physical Education.

13. Annexure A to W.A.No.1787/06 includes minutes of the Syndicate convened for exercise of the powers of Senate held on 19.7.2004. On that date, there was no senate constituted. Therefore, the Syndicate was enabled to perform the functions of the Senate. Performing that function, a meeting of the Syndicate was held on 19.7.2004. One among the

items of agenda was '**Draft amendment to Calicut University First Ordinance 1978**' incorporating new qualifications for the post of Director of Physical Education, by amending the Ordinance. That means, when the new schedule was incorporated by the Senate in the meeting held on 30.3.2001 and 31.3.2001 Director of Physical Education was taken out of the non-teaching post covered by the schedule and the post was existing as a teaching post. Thereafter, by Annexure A amendment, the qualification to the said post was included in the schedule to the First Ordinance 1978. It is not in dispute that the schedule is in respect of non-teaching post in the University. When thus by reason of Annexure A, the Ordinance is again amended with certain qualifications, necessarily, the post of Director

of Physical Education again comes within the non-teaching post. Thus, there is a conscious amendment by the Senate as contained in Annexure A stipulating qualifications to the post of Director of Physical Education. When the qualifications were prescribed for the post of Director of Physical Education by way of conscious amendment on 19.7.2004 to the schedule, the irresistible conclusion is that from that date onwards, the said post is included in the non-teaching category. Ext.P1 is dated 12.11.2004, later than Annexure A. Necessarily, what is notified is for the recruitment to the non-teaching post of Director of Physical Education.

14. Next, we will consider whether there is any upper age limit for the said post. The post was

included earlier as item No.56 in the schedule with the specification regarding age as not more than 45 years. When the schedule was substituted in the year 2004, based on the Senate decision in its meeting held on 30.3.2001 and 31.3.2001, the post is taken out of the schedule. It did not find a place in the substituted schedule which was appended to the decision of the meeting of the Senate which made that amendment. As per Annexure A dated 19.7.2004, it was again included in the schedule. There, the earlier qualification was also indicated because earlier amendment of substitution of the schedule was not gazetted on 19.7.2004. It was gazetted only on 14.12.2004. Only qualifications are incorporated as per Annexure A and no age limit is prescribed. It cannot,

therefore, be contended that the when the schedule was substituted in 2004, the stipulation regarding posts which did not appear in the new schedule which found a place in the old one still survived after the substitution as mentioned above. The post of Director of Physical Education finds a place in the schedule again only by reason of Annexure A, that too without any specification regarding age limit.

15. But Clause 3(1) of Chapter XV of the First Ordinance, 1978 as already extracted above, contains that requirement regarding age limit shall be an essential factor to be mentioned in the schedule. Therefore, it is an essential thing, at least, when direct recruitment is notified. When the manner of filling up is by promotion or appointment by transfer, necessarily,

the age requirement may not be relevant as the incumbent is already in service and will have a right to be promoted, based on his seniority or qualification or suitability, as the case may be. As regards direct recruitment, as is notified in Ext.P1, age requirement in terms of Clause 3(1) of Chapter XV of the Ordinance is an essential requirement. It is further stated in clause 3 (3), no person shall be eligible, unless he possesses the minimum qualifications prescribed thereof which may include the age qualification whenever prescribed. But if direct recruitment is resorted to, the maximum age limit is an essential requirement to avoid and avert arbitrariness.

16. If an upper age limit is not thus stipulated in the notification as done in Ext.P1, it will be possible

for any one in the helm of affairs of selection to prefer a person of his choice if he comes beyond the age on the plea that there is no upper age limit or if he comes within particular age limit on the ground that age fixation is reasonably necessary. The recruitment to a public authority like University shall not be thus left to the whims and fancies of persons who are in the helm of affairs. Taking note of such a situation as to the promotions to be effected to higher posts, whether the position to be considered is as on the date of effecting promotion or as on the date of occurrence of the vacancy, a Full Bench of this court in **Varghese v. State of Kerala {1981 K.L.T. 458}** made it clear that in such matters, definiteness shall always be kept up in order to avoid arbitrariness so that eligibility of the

person shall be fixed in advance and held that it was the date of occurrence of vacancy and not the date of effecting promotion which shall be the criterion for appointment of a candidate. Another Full Bench in **James Thomas v. Chief Justice {1977 K.L.T. 622}**, has also stressed importance of definiteness to avoid arbitrariness, while making appointments. We are of the view that in the matter of direct recruitment, there shall be definiteness with regard to the age limit of the candidate to be preferred for appointment. When it is absent, necessarily, as in this case, it may be possible that a candidate who is nearing the age of retirement may apply. That shall not be the situation. There is also a possibility of arbitrary exercise of power in choosing candidates.

17. Therefore, we are of the view that the notification Ext.P1 is arbitrary. Necessarily, that ought to have been quashed by the learned single Judge in W.P.(C)No.37009/04, leading to W.A.No.2053 of 2006.

18. When we are taking that view, we need not go into the controversies debated in W.A.No.2053/06. The Syndicate Sub Committee of the University of Calicut has also examined the matter, and though late, filed an affidavit, stating that they did not intend to fill up the post, because of these confusions .

In such circumstances, the appeals are allowed setting aside the impugned judgment. W.P.(C) No.37009/04 consequently stands allowed quashing Ext.P1 notification. The selection made pursuant to

Ext.P1 notification does not have any effect. W.P.(C) No.18412/05 shall stand dismissed.

Sd/-
(K.A.ABDUL GAFOOR)
JUDGE

Sd/-
(K.R.UDAYABHANU)
JUDGE

sk/

//true copy//

P.S. To Judge.

K.A.ABDUL GAFOOR &
K.R.UDAYABHANU, JJ.

W.A.No.1787 & 2053 of 2006

JUDGMENT

6th February, 2007.